85-1647

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN
Petitioner

vs.

THE STATE OF TEXAS
Respondent

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TEXAS, 10TH JUDICIAL DISTRICT AT WACO, TEXAS

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AFFIRMED
JANUARY 17, 1986

NO. 10-84--016-CV

Trial Court
81-69

IN THE

COURT OF APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO

HOWARD RUBINSTEIN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

* * * * * * * * * * * * *

From 61st Judicial District Court
Harris County, Texas
* * * * * * * * * * * * *

This is a disbarment proceeding instituted in the name of the appellee the State of Texas by the Grievance Committee for State Bar District No.

4-B against appellant Howard Rubinstein. Judgment was rendered that appellant be disbarred. This judgment was based on jury findings, involving ten of appellant's clients, that on twenty different occasions appellant signed clients' names to checks payable to them without the clients' authority; committed eleven acts of commingling of his funds with clients' funds; committed eleven acts of misapplication of clients' funds; settled clients' cases without the clients' knowledge nine times; failed to pay the clients' share of settlement on time on eight different occasions; failed to pay to clients the full amount they were entitled from settlements; failed to notify a client of a settlement; and failed to pay off a lien on a client's

car on time. The trial court concluded from these findings that appellant had committed violations of State Bar Disciplinary Rules 1-102(A)(D), 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 6-101(A)(3), 7-101(A)(1), 7-101(A)(2), 7-101(A)(3), 9-102(A) and 9-102(B) of the Code of Professional Responsibility.

This case began with the filing of appellee's formal complaint on January 2, 1981. Appellant answered with a general denial on February 26, 1981. Appellee's first amended formal complaint was filed on March 10, 1983. On May 23, 1983, the case was set for trial for July 18, 1983. Appellee's second amended formal complaint was filed on June 9, 1983. On the scheduled trial date, July18, 1983, appellant's counsel filed a motion to

withdraw citing irreconcilable differences between counsel and appellant. The motion was denied that day. Counsel also filed a motion for continuance on July 18, 1983, citing defense counsel's trial schedule, defense counsel's discomfort following eye surgery, and the need for more discovery due to the added allegations in appellee's second amended formal complaint. The trial court denied the motion for continuance on that day. Following this denial, appellant discharged his attorney. Although the court had denied the motion for continuance, following appellant's discharge of his attorney the court granted appellant a continuance on July 18, 1983, and reset the trial date for August 18, 1983. At this point in the proceedings, appellant began representing himself.

Appellant filed a motion to file pro se motions, asserting the need to do extensive discovery and pleading before trial. Appellant also sent interrogatories to appellee. A hearing on these matters was held on August 3, 1983, and to the extent that appellant's motion to file pro se motions might interfere with the trial setting for August 18, 1983, the motion was denied. At this hearing appellant made an oral motion seeking a continuance in order that he might "find counsel of his choosing." This motion was also denied. Appellant pro se then filed special exceptions on August 8, 1983. On August 9, appellant filed his first amended plea in abatement and his second amended original answer subject to plea in abatement, both signed by attorney Forest Brazelton. There was no hearing on the

exceptions or the motion to abate, and appellant did not obtain the requested relief. On August 15, 1983, appellant pro se filed in Federal District Court a complaint to enjoin the enforcement of the State Bar Act and filed pro se in the State District Court an application for injunctive relief to stay the trial and enjoin enforcement of the State Bar Act.

The case eventually came on for trial on August 23, 1983. At that time appellant filed a motion to withdraw as attorney pro se. The motion claimed that appellant would not be able to "effectively represent himself due to the inability to be objective in the presentation of his own case" and further asserted that appellant had been unable to prepare for trial because of his "emotional frame of mind." Also on this day, appellant filed another motion for

continuance asserting that two attorneys of his choice, Forest Brazelton and Warren Burnett, had conflicts in their schedules and could not enter the case immediately. Burnett's affidavit was attached to the motion, but there was not one from Brazelton. Both motions were denied on August 23rd.

The case went to trial with appellant representing himself, and a jury was selected. On the following morning, August 24, 1983, appellant failed to appear at the trial. The trial judge stated into the record that a lawyer who disclaimed representation of appellant had called the clerk that morning to say that appellant was in the hospital. The court proceeded with the trial in the absence of appellant. The next day, August 25th, a motion for continuance for appellant signed by attorney James

Patterson was filed with the court. The motion maintained that appellant was "mentally and emotionally unfit to either assist his counsel or act as his own counsel at this time" and that he was "consulting his treating doctor at this time and is under the doctor's care for an undetermined period of time." Attached to the motion was a statement "sworn to and subscribed" by Alan Davis, M.D., before a Notary Public, which stated that appellant was an inpatient at the Methodist Hospital and "due to [appellant's] present medical condition, I request the court to relieve him from any participation in the trial before the court at the present time." The court overruled this motion and proceeded with the trial.

Evidence at the trial shows that on multiple occasions appellant settled

cases without his clients' consent or knowledge, and signed his clients' names without authority on insurance drafts when the checks arrived at his office. These insurance checks, each representing a settlement amount, were then deposited into the law firm's trust account. Then appellant had his secretary make out checks from this trust account to the firm for legal fees and to physicians and others for expenses and to the respective client for his or her portion of the settlement. Instead of quickly providing the clients with their share of the settlement, appellant would sign the client's endorsement without authority on the back of the check and deposit the check into a general purpose account maintained by appellant for his personal use. Appellant used this account to pay his personal bills and used it in a

manner inconsistent with a trust account. At times the balance in this account dropped the amount which represented the clients' interests in the settlements. The evidence showed that many clients received their money several months after settlement checks had been received, signatured and deposited. Appellant used this technique with at least nine clients. Testimony from the clients and from appellant to the Grievance Committee and exhibits such as various insurance drafts, firm checks and deposits slips were used to prove these acts of forgery, commingling and misapplication.

Appellant asserts under his first two points of error that the trial court erred by denying his motion for continuance filed August 25th based on illness, and by denying the motion for continuance filed August 23rd based on

his inability to appear by counsel of his choice. We hold there was no error.

An order granting or denying a motion for continuance will not be disturbed on appeal unless there is a clear showing of abuse of discretion. The matter is to be judged in light of ths facts before the trial court at the time the motion was ruled on. Gulf Ins. Co. v. Dunlop Tire & Rubber Corp., 584 S.W.2d 886 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.).

On July 18, 1983, the day the case was first called for trial, appellant discharged the Honorable Davis Grant, his attorney from the beginning of the case who filed his answer in February, 1981. Although appellant was then granted an additional thirty days by the court in which new counsel could have been obtained, appellant waited until the day

of trial on August 23, 1983, to present his motin asserting that he could not proceed pro se and could not effectively present his case without aid of counsel. His other motion reflected that he had contacted two attorneys "of his choice" during that time period, but it shows that only one of the two was unavailable to aid him in his defense. Moreover, the motion does not explain why appellant was not able to contact more than two attorneys in a thirty-day time period in a city as large as Houston where appellant practiced and where this case was being tried.

Absence of counsel as ground for a continuance requires a showing of diligence in seeking substitute counsel and lack of fault by the complaining party in withdrawal of prior counsel. Strode v. Silverman, 217 S.W.2d 454,

455-6 (Tex.Civ.App.--Waco 1949, writ ref'd); Van Sickle v. Stroud, 467 S.W.2d, 511 (Tex.Civ.App.--Fort Worth 1971, no writ). We fully recognize the valuable right of any litigant to be represented in the trial of his case by counsel of his choice. Nevertheless, our record simply does not show that absence of counsel did not result from want of diligence or fault by appellant. To the contrary, the trial court was entitled to believe under the record that appellant's actions and absence of counsel and the motions were desinged by appellant to avoid trial. We hold there was no abuse of discretion in the denial of the motion for continuance based on lack of counsel.

Similarly, we hold that the trial court did not abuse its discretion in denying appellant's motion for continuance alleging appellant was ill.

The motion alleged that appellant was "mentally and emotionally unfit to either assist his counsel or act as his own counsel at this time"; and that appellant was hospitalized and was being treated by Dr. Davis for an "undetermined period of time." The trial court was not required to grant this motion if it did not set forth sufficient cause supported by affidavit. Rule 251, Vernon's Tex.R.Civ.Proc. It is doubtful that the physician's affidavit, quoted above, even stated that appellant was ill. In any event, it did not state the nature of appellant's illness or how long the illness might last. It did not indicte the severity of the illness or that such illness would prevent attendance at trial or affect appellant's ability to assist his counsel or represent himself as alleged in the

motion. Finally, at the hearing on appellant's motion for new trial, appellant offered no medical testimony to buttress his claim of illness, but only reoffered the affidavit of Dr. Davis.

Appellant argues that since the motion and the affidavit of Dr. Davis were not controverted by appellee the trial court was required to accept them as true. We disagree. The trial court was entitled to examine the motion in light of the record before it. Fritsch v. J. M. English Truck Line, Inc., 151 Tex. 168, 246 S.W.2d 856, 858 (1952). In light of the record and the sketchy allegations and proof in the motion and affidavit we hold that appellant has not shown an abuse of discretion in the denial of the motion based on illness. Insofar as the motion was directed toward appellant's absence as a witness for himself, the

motion did not show the content nor materiality of appellant's testimony and thus did not comply with Rule 252, Vernon's Tex.R.Civ.Proc. Appellant's first two points of error are overruled.

At the trial, certain checks, bank statements, insurance drafts, law firm deposit slips, law firm disbursement sheets, and client employment contracts with appellant were admitted into evidence during and through the testimony of appellant's former secretary, Sheila Jacklyn. Appellant asserts these exhibits had no probative value because they were hearsay, and thus there was no evidence to support the jury findings. Miss Jacklyn testified that her duties as secretary at appellant's law firm included interviewing clients, preparing cases for settlement or trial, answering interrogatories, writing checks from the

law firm's "trust account" and from appellant's general purpose account, and preparation of the firm's disbursement sheets. The evidence admitted through Exhibits 1 through 12, complained against by appellant, consisted of client employment contracts with appellant, checks written from appellant's law firm account and from his general purpose account, deposit slips and law firm disbursement sheets. Miss Jacklyn's testimony showed that she made out the checks and typed the disbursement sheets, that she recognized the signatures on the checks were in appellant's handwriting, and that she was either directly or indirectly involved in the preparation of the other instruments identified by her. Since the existence and identification of this evidence was within the personal knowledge of Miss Jacklyn it was not

hearsay. Appellant futher argues that Miss Jacklyn was not qualified to identify his handwriting or endorsements on the checks as his because she was not an expert in handwriting analysis. However, her testimony established that she had worked for appellant and was familiar with his signature and handwriting. With this knowledge her identification of appellant's endorsements and writings had probative value without need of her qualification as a handwriting expert. We hold exhibits 1 through 12 were properly admitted.

Exhibits 25 and 26, complained against by appellant, consisted of bank statements and checks and deposit slips from appellant's law firm trust account and from his general purpose account. Exhibit 25 showed the deposit of

insurance settlement drafts into the law firm account and Exhibit 26 showed the transfer of the clients' portion of the settlements to appellant's general purpose account. Exhibit 26 also showed that funds were used from the general purpose account to pay some of appellant's personal bills. The exhibits showed further that each of the accounts was overdrawn at times. We believe these exhibits were properly before the jury. In any event, this evidence that insurance settlement drafts were deposited in the law firm account, that the clients' portion of the settlements was transferred to appellant's general purpose account, that funds were used from the general purpose account to pay appellant's personal bills, and that the general purpose account had been overdrawn was merely cumulative of other

evidence introduced at the trial including testimony by Miss Jacklyn, by clients involved and by appellant before the Grievance Committee. Thus, if there was error in the admission of Exhibits 25 and 26 the error was harmless under the whole record and could not have been calculated to cause rendition of an improper judgment.

Appellant's remaining arguments about the admission of evidence complain against exhibits admitted by the trial court under the business records exception of Vernon's Tex.Civ.Stat. art. 3737e. Our review of the record shows that these complaints are wholly without merit, and they are overruled.

Appellant's fourth point of error is based on claimed defects in the court's charge to the jury. We find no merit in these contentions, and they are overruled.

In his final point of error appellant argues that the trial court abused its discretion in assessing the punishment of disbarment. We disagree. Appellant argues that punishment of disbarment was too severe for the act of commingling. However, the record shows multiple acts of commingling and multiple acts of unauthorized settlement of claims, unauthorized endorsement of clients' checks, and misapplication of clients' funds. We find no abuse of discretion.

Appellant's points and contentions are overruled. The judgment is affirmed.

VIC HALL
Associate Justice

ORDERED NOT PUBLISHED
Rule 452, T.R.C.P.

COURT OF APPEALS
TENTH DISTRICT
WACO, TEXAS

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth District of Texas, at Waco, hereby certify that the foregoing 8 page(s) contain(s) a true and correct copy of the Opinion filed in said Court on the 17th day of January, 1985, in the following numbered and entitled cause, to wit:

HOWARD RUBINSTEIN,

Appellant

NO. 10-84-016-CV

THE STATE OF TEXAS,

Appellee

on appeal to said Court from Harris County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Waco, this the 10th day of April, 1986.

ROBERT G. WATTS, Clerk

BY: _____